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CONTEMPT OF COURT BY MISBEHAVIOR OF PERSON IN THE PRESENCE OF COURT OR SO NEAR AS TO OBSTRUCT ADMINISTRATION OF JUSTICE.

In *Toledo Newspaper Co. v. United States*, 38 Sup. Ct. 560, it was held by a majority of five to two, two justices not participating, that § 268 of Federal Judicial Code providing that "the said courts (United States courts) shall have power * * * to punish by fine or imprisonment, at the discretion of the court, contempts of their authority: Provided, that such power to punish for contempt shall not be construed to extend to any cases except the misbehavior of any person in their presence or so near thereto as to obstruct the administration of justice," embraces the printing and publishing of newspaper articles in regard to a pending case, said articles appearing in the town or city where the court is sitting.

The Chief Justice, speaking for the majority, does not find in this statute any limitations on power to punish for contempt of courts "not already existing." It only plainly marks "the boundaries of the existing authority resulting from and controlled by the grants which the Constitution made and the limitations which it imposed."

He further says: "The provision, therefore, conformably to the whole history of the country, not minimizing the constitutional limitations nor restricting or qualifying the powers granted by necessary implication recognized and sanctioned the existence of the right of self-preservation; that is, the power to restrain acts tending to obstruct and prevent the untrammelled and unprejudiced exercise of the judicial power given, by summarily treating such acts as a contempt and punishing accordingly."

When we consider that a federal court is of purely statutory creation and has naught but conferred power, we are given to wonder how more plainly Congress could have expressed itself in this grant of power, and its proviso limiting its exercise.

It seems to us, therefore, that all of the discussion shown by the Chief Justice as to the power of courts in summary punishment for contempt of court, and there being no distinction between acts *in facie curiae* and those committed out of its immediate presence, but which immediately tend to obstruct the administration of justice, is beside the mark, because the statute says summary punishment is to be only for what is in the court's immediate presence or so near thereto as to constitute immediate presence.

Why may it not be provided that "misbehavior" to be summarily punished has for its test the overcoming or impairment of a court's immediate efficiency in administering justice or which directly so tends?

All of us may concede that "self-preservation" of a court may, on occasion, be more seriously threatened by acts not in its immediate presence, than may other acts there done, but we do not have to grant thereby, that the court is not to be protected at all, or suitors therein, from all other kind of interference or even obstruction.

What seems to us to have been aimed at is that no one without subjecting himself to summary punishment shall be guilty of misbehavior, where that creates disorder in plain view of the court or so near thereto as to interfere-with or obstruct its proceeding.

This view does not necessarily concern preservation of the court or any rights of suitors before it. It only secures orderliness, as, say, from a drunken man, or an attorney badgering a witness, or loud and offensive speech by a witness or an attorney, or any recalcitrancy by a juror, witness or officer from whom the court is entitled to respect and obedience. It differentiates

a court from a town meeting or other sort of assembly. The judge as looker on is presumptively best able to appraise the quality of the disturbance.

A dissent by Justice Holmes, concurred in by Justice Brandeis, says the statute contemplated "only immediate and necessary action" by the Court, and not a case where "summary proceeding" does not need to be taken at all.

Justice Holmes further says that: "When it is considered how contrary it is to our practice and ways of thinking for the same person to be accuser and the sole judge in a matter which, if he be sensitive, may involve a strong personal feeling, I should expect the power to be limited to the necessities of the case to insure order and decision in their presence."

Rarely would it occur that one merely preserving "order and decorum" in court would have his "personal feeling" involved in passing on a question; rarely, on the contrary, might that "personal feeling" not thought to be invited, if attempted intimidation or long-distance abuse is resorted to in attempted obstruction. Furthermore, the latter scarcely may be free from attempt personally to influence a judge, while in the other kind of obstruction, it, in most instances, has nothing whatever to do with his personality. It is the same kind of obstruction for an attorney, for example, to engage in a fisticuff with opposing counsel during progress of a cause, as to have a *rencontre* with a witness or the judge. The right or wrong of neither fight might be involved. It is enough that disorder is created and progress of a trial is impeded.

Again, suppose assault is made upon a judge, or violent abuse is heaped on him in a court room and all of this is for the purpose of intimidation in an action pending or to come before him. It seems to us, that the assailant might be punished in two separate trials for two kinds of contempt, one for disturbing order and the other for indirect contempt, and before he can be

punished for the latter, he ought to have the benefit of a jury trial before another judge. The days of *lese majeste* are not in accordance with American traditions. It is one thing to be accused of contempt for a Jeffreys, and another for contempt of the Court over which a Jeffreys is a judge, and for the former sort of trial, the facts hardly might be so simple and clear as in the latter.

NOTES OF IMPORTANT DECISIONS.

RESTRAINT OF TRADE — COVENANT RUNNING WITH A BUSINESS PURCHASED.—In *Palumbo v. Piccoloni*, 103 Atl. 815, decided by New Jersey Court of Chancery, it was held, that where the proprietor of a shoe repairing business bought out a competitor and the latter agreed not to engage in business of that kind in the city where located for five years, the subsequent sale by the purchaser of the business to one whose competition was less to be feared, the purchaser having this in view, does not do away with the restraint that was imposed by the former contract of sale.

The court said, in a suit by the original purchaser from defendant, the first seller, that:

"Complainant now bases his right to relief upon the claim that, when he purchased defendant's business he did not want it, but purchased it solely, or almost solely, for the benefit of his, complainant's, old business; that he sought to remove defendant as a competitor in business by reason of defendant's peculiar ability to draw trade from complainant; that the price paid was based upon those considerations; that after conducting both businesses for a few months he sold the business which he had purchased from defendant to a person whose competition he did not object to; that defendant's new establishment, which is near complainant, will withdraw from complainant's old business the very trade which complainant procured by means of the purchase. These several claims of complainant are not denied and no claim is made that the covenant is unreasonable as to time or territory."

Defendant claimed that the sale of the business to a third party negated the covenant for partial restraint of trade; in other words, it was not a covenant running with the business sold, but purely a personal covenant and the reason for its continuance ceasing the covenant itself ceased. Such, at least, we take the defendant's claim to mean.

The court does not do more than mention defendant's contention and does not decide

squarely whether such a covenant runs with the business sold or is purely personal to the purchaser of the business. It contents itself with regarding the effect of the covenant as one permissible to be made, and sees no difference in its continuance in favor of the third person.

The court said:

"In the present case complainant, who had a business of his own, purchased a similar business of a trade competitor. Admittedly he was primarily induced to make the purchase in order to remove the competitor from that field of operation, but he had no purpose to close out the business so purchased, and did not do so. On the contrary, he conducted both businesses as they had been heretofore conducted until he found a satisfactory purchaser for the business so purchased, and that business is still being conducted as before. In all of this the public interests have been in no way affected by the withdrawal of defendant from business, for no withdrawal or trade enterprises occurred or was planned, and it is idle to say that complainant's ownership of two shoe repairing shops constituted or tended to constitute a monopoly in that industry; indeed, the extremely limited magnitude of these two businesses seems scarcely to justify the present litigation. The covenant of defendant not to engage in a similar business in that vicinity for the limited period obviously was not only for the benefit of the business sold by defendant, but also for the benefit of complainant's other business. Complainant intended that it should be so, and paid for that measure of protection, and defendant could not have been ignorant of complainant's purpose or of the measure of protection which complainant purchased and paid for, since in the written agreement no suggestion is made that the protection of the covenant shall cease until the expiration of the specific period of time named. If, then, defendant has been thus enabled to profit by his covenant, and the public interests have been in no way adversely affected by his withdrawal from the field for the period specified, there appears to exist no good reason to deny to complainant the full measure of protection which the terms of defendant's covenant extend."

Here it would seem that the court assumes that the original purchaser still had an interest—valid at law—in the enforcement of the covenant. If he had, it must be said the court believed that the covenant ran with the business.

RAILROADS—NEGLIGENCE BY SERVANT OF PULLMAN PALACE CAR COMPANY.—In *Rogers v. Phila. & R. Ry. Co.*, 103 Atl. 873, decided by Supreme Court of Pennsylvania, it was held that a passenger, who had no knowledge of Pullman palace cars being operated under an independent contract with a railroad, may sue the latter for any negligence by a porter of the Pullman Company. This ruling

reversed the decision of the trial court holding that, if plaintiff had any cause of action, it was against the Pullman Co., the negligence of whose servant, if any, caused injury to plaintiff.

The Supreme Court quotes from *Pennsylvania Co. v. Roy*, 102 U. S. 451, that: "The law will not permit a railroad company engaged in the business of carrying persons for hire, through any device or arrangement with a sleeping car company whose cars are used by the railroad company and constitute a part of its train, to evade the duty of providing proper means for the safe conveyance of those whom it has agreed to convey."

In this case the injury suffered was in consequence of a passenger on a Pullman car on a dark night attempting to alight from one of its cars and expecting to find placed for him to step on a stool at the foot of the car steps. The porter had not placed a stool there and the passenger's reasonable expectation caused him to fall.

Here it would seem that such means are not those supplied to the general travel, and presumptively are not needed for safe conveyance of passengers, and a railroad could not well direct that Pullman passengers should be supplied with these aids in alighting and the general public not. If, therefore, they add in no necessary way to safety, and yet cause a passenger to be misled to his injury, the railroad ought not to be held liable for the misleading condition. This springs out of something for which the railroad as a common carrier is in no way responsible. Indeed, it might be said to arise out of breach of duty under contract of the palace car company with its customer, relating only indirectly to the latter's safety.

ATTORNEY AND CLIENT—LIEN OF ATTORNEY ON JUDGMENT UNDER FEDERAL EMPLOYERS' LIABILITY ACT.—In *Dickinson v. Stiles*, 38 Sup. Ct. 415, it is held that a state statute giving to attorneys a lien on causes of action by their clients is applicable to an action in the courts of the state based on Federal Employers' Liability Act.

It was said: "Cases that declare that the acts of congress supersede all state legislation on the subject of the liability of railroad companies to their employees have nothing to do with the matter (superseding state legislation). The Minnesota statute does not meddle with that. It affects neither the amount recovered nor the persons by whom recovered, nor the principles of distribution. It deals only

with a necessary expense of recovery. Congress cannot have contemplated that the claims to which its action gave rise or power would be paid in all cases without litigation or that suits would be tried by lawyers for nothing, yet it did not regulate attorneys' fees. It contemplated suits in state courts and accepted state procedure in advance. We see no reason why it should be supposed to have excluded ordinary incidents of state procedure."

This is a latitudinarian way of regarding "state procedure." Naturally that would seem to include things only of pleadings, evidence, rulings, etc., in a trial on the issue of recovery or not. Also it might embrace means of enforcement of the judgment, steps for appeal and review. When you take in collateral things which affect the amount of recovery going to plaintiffs, that might appear to some as wholly different. Whether the Director General of railroads may modify or absolutely deny attorneys' claims under state statutes presents still another question. We are rather inclined to the view that he may limit the reach of such statutes.

PROPOSED ENGLISH MINISTRY OF JUSTICE.

At the annual meeting of the English Law Society the president brought forward and advocated a proposal for the establishment of a Ministry of Justice. Several new Ministries have been created in consequence of the pressure of circumstances brought about by the war, and others, such as a Ministry of Commerce and a Ministry of Health, are in immediate contemplation. The proposal has given rise to a wide and interesting discussion and our impression is that the prospects of the scheme have been decidedly advanced by the action of the president of the Law Society.

The proposal, it should be said, however, is not new nor is it without precedent. In every civilized country in the world, except Britain, it has been found necessary to establish a department of State, charged with the duty, to use the president's words, "of

supervising and managing the legal machinery of the country, seeing that it is of the best design to fit it for its work, repairing any breakdown, oiling its bearings and generally keeping it in working order and adopting any improvements in it which experience or increased knowledge may suggest."

Moreover, the establishment of such a department has had powerful advocates in England from time to time, the latest being Lord Haldane, who recently stated, before a Royal Commission appointed to investigate an administrative question: "You will never solve the great problem that you have until you set up a Ministry of Justice." In the discussions regarding the proposals which have emerged, very many questions have been mentioned as suitable for the attention of such a Ministry; but we instance three which are general in their nature and the position of which here may, by way of comparison, interest our readers.

One of the most interesting functions suggested for such a Ministry would be the establishment of a department of Foreign Law, which would give information and assistance as to the enforcement of British judgments in foreign countries and also as to the enforcement of foreign judgments in this country. The want of such a department has been acutely felt since the war. International trade had been so highly developed that interruption by hostilities brought up a great many questions to the solution of which reference to Foreign Law was necessary. This could only be obtained at considerable expense and at very great delay, and in some cases has not yet been obtained. Had a department of Foreign Law been in existence, the rights and obligations of parties could, to a great extent, have been quickly and authoritatively settled and their position defined as well as the work of the courts facilitated.

In the next place there is the present position of arbitration procedure. This is a

subject that is here taken up by Trade Associations. Each association prepares an elaborate form of contract for use in its particular trade, containing a stringent arbitration clause by which all disputes of whatever kind are generally referred to two trade arbitrators and a trade umpire, with a right of appeal to the committee of the association, also, of course, composed of business men. The arbitrators and umpires do not as a rule proceed in any regular way. The arbitrators treat themselves as advocates for the respective parties who appoint them. They hear no evidence or legal argument, and they frequently do not even hear the parties or have a meeting of the parties. The rules of many of the associations, even when there is an appeal, preclude any legal representatives of the parties before the tribunal. The umpire or the appeal committee generally hears the arbitrators as advocates and decides questions both of fact and of law, the former often on very insufficient materials and very superficial investigation, and the latter without any professional guidance as to what is the law of the matter under discussion. Such tribunals are eminently fitted to decide such questions as whether a particular parcel is in accordance with sample or with the contract description, and a very large number of such disputes are settled by means of these tribunals much more cheaply and satisfactorily than would be possible in a court of law. But to submit to a lay tribunal, unversed in law and unskilled in sifting facts, questions involving complicated facts and difficult questions of law is a waste of time and energy. The spin of a coin would afford a cheaper and quicker and not less satisfactory result. The decisions which are arrived at in such cases are not infrequently grotesque and produce the greatest injustice. Now a Ministry of Justice could appropriately intervene in such circumstances as the above and delimit and regu-

larize the procedure of these informal tribunals.

In the last place there is the vexed question of the judicial determination of commercial questions. The reason why arbitration practice has flourished to such an extent is the slowness and complexity of judicial proceedings. Twenty-three years ago in response to the demands of business men for expedition in giving judgment in commercial cases, a special Commercial Court was formed, but the Court of Appeal ruled that, in that Court, procedure must follow the same lines as in the existing courts, with the result that the practice of the Commercial Court is not now substantially distinguished from that of other courts. The sole advantage (and it is a very great advantage) now resulting from the establishment of the Commercial Court is that the judge presiding in that Court is always of special experience in commercial work, and can be relied upon to take into account the business man's point of view upon the matter discussed before him, but nevertheless the fact remains that the procedure is far too dilatory and too expensive. Here again it is thought the hand of a Ministry of Justice might profitably be felt and by simplification of procedure do much to remove the reproach of slowness which, in the eyes of the business man, the Courts have acquired.

Space does not permit of fully dealing with the other subjects, such as Reform of Procedure, Legal Education, Supervision of Patronage, etc., which a Ministry of Justice might take into its charge. It is not likely that such a Ministry will be established here during the present war, but certainly the introduction of the subject at the present juncture has been all to the good.

DONALD MACKAY.

Glasgow, Scotland.

WHY KING ALFRED HANGED FORTY-FOUR JUSTICES IN ONE YEAR.

One of the most ancient if not the oldest commentaries on English Law is the *Mirroure of Justices*. This book was edited by Andrew Horne in the reign of Edw. II, but is supposed to have been written by some unknown author (possibly by some ancestor of the compiler), in the time of Edward I, or sooner. It may have been a family chronicle extending over a period of years.

For many years the work had a great vogue. Coke called it the greatest book of common law and Finlayson, in his edition of Reeves History of the English Law, praises it very fulsomely as the chief source of our knowledge of the early common law principles.

The work has recently been discredited as an accurate source of legal principles and practice by the researches of F. W. Maitland, who in his introduction to the edition of the work published by the Selden Society, declared the author to be a romancer.

Subsequent investigations have shown that Maitland was too severe in his condemnation.¹ It now appears that while the author was evidently not a lawyer, and was very unexact in his conceptions of judicial institutions and procedure, as well as of the principles of the common law, he had at any rate a fairly accurate appreciation of the manner in which the law was enforced and the attitude of the public mind toward the institutions of justice.

The most famous passage in the *Mirroure* is the author's accounts of the exploits of King Alfred in cleaning out the Aegean Stables of justice by "hanging forty-four justices in one year as murderers for their false judgments."

While these stories are probably without foundation in fact they are extremely val-

uable as indicating not only the popular conceptions of the miscarriages of justice in the time of the Plantagenets, but also as referring to some probable occurrences similar to those which are related. They at least give us the only contemporary picture of the procedure and administration of the law in the earliest historical periods of development of the common law.

The story of King Alfred's famous exploits are recorded as follows:

It is abuse that justices and their officers, who kill people by false judgment, be not destroyed as other murderers, which King Alfred caused to be done, who caused forty-four justices in one year to be hanged as murderers for their false judgment.

1. He hanged Darling because he had judged Sidulf to death, for the retreat of Edulf his son, who afterwards acquitted him of the fact.

2. He hanged Segnor, who judged Ulfe to death after sufficient acquittal.

3. He hanged Codwine because he judged Hackwy to death, without the consent of all the jurors, and whereas he stood upon the jury of twelve men, and because three would have saved him against the nine, Codwine removed the three, and put others upon the jury, upon whom Hackwy put not himself.

4. He hanged Cole, because he judged Ive to death when he was a mad-man.

5. He hanged Malme because he judged Prat to death upon a false suggestion that he committed the felony.

6. He hanged Atbulf because he caused Copping to be hanged before the age of one and twenty years.

7. He hanged Markes because he judged During to death by twelve men who were not sworn.

8. He hanged Ostline because he judged Seaman to death by a false warrant, grounded upon false suggestion, which supposed Seaman to be a person in the warrant, which he was not.

(1) I. S. Leadam, 13 L. Q. R. 98.

9. He hanged Billing because he judged Leston to death by fraud; in this manner he said to the people: Sir, all ye here but he who assisted to kill the man, and because that Leston did not sit with the other he him commanded to be hanged, and said that he did assist, where he knew he did not assist to kill him.

10. He hanged Seafaule because he judged Olding to death for not answering.

11. He hanged Thurston because he judged Thurgeuer to death by a verdict of enquest, taken ex-officio without issue joined.

12. He hanged Athelston because he judged Herbert to death for an offence not mortal.

13. He hanged Rombold because he judged Lischild, in a case not notorious, without appeal, and without indictment.

14. He hanged Rolfe because he judged Dunstan to die for an escape out of prison.

15. He hanged Freburne because he judged Harpin to die, whereas the jury were in doubt of their verdict, for in doubtful causes one ought rather to save than to condemn.

16. He hanged Seabright, who judged Aihebbus to death because he condemned one by a false judgment mortal.

17. He hanged Hale because he saved Tristram the sheriff from death, who took the king's use from another's goods against his will, for as much as any such taking from another against his will, and robbery hath no difference.

18. He hanged Arnold because he saved Boyliffe, who robbed the people by colour of distresses, whereof some were by selling distresses, some by extortion of fines, as if betwixt extortion of fines, releasing of tortious distresses and robbery there were difference.

19. He hanged Erkinwald because he hanged Franklin, for naught else but because he taught to him who vanquished by battle mortal to say the word of cravant.

20. He hanged Bermond because he caused Garbolt to be beheaded by his judgment in England, for that for which he was outlawed in Ireland.

21. He hanged Alkman because he saved Cateman by colour of disseisin, who was attainted of burglary.

22. He hanged Saxmond because he hanged Barrold in England, where the King's writ runneth for a fact, which he did in the same land where the King's writ did not run.

23. He hanged Alflet because he judged a clerk to death, over whom he had not cognizance.

24. He hanged Piron because he judged Hanting to death because he gave judgment in appeal before the forty days pendant the appeal, by a writ of false judgment before the king.

25. He hanged Diling because he caused Eldon to be hanged, who killed a man by misfortune.

26. He hanged Oswin because he judged Fulcher to death out of court.

27. He hanged Muclin because he hanged Helgrave by warrant of indictment not special.

28. He hanged Horne because he hanged Simin at days forbidden.

29. He hanged Wolmer because he judged Graunt to death by colour of a larceny of a thing, which he had received by title of bailment.

30. He hanged Therberne because he judged Osgot to death for a fact, whereof he was acquitted before, against the same plaintiff, which acquittance he tendered to aver by oath, and because he would not aver it by record, Therberne would not allow of the acquittal which he tendred him.

31. He hanged Wolstor because he adjudged Haubert to death at the suit of the king, for a fact which Haubert confessed, and of which the king gave him his pardon, but he had no charter thereof, nevertheless he vouched the king to warrant it, and fur-

ther tendred to aver it by inrolment of the chancery.

32. He hanged Oskitell because he judged Catling to death, by the record of the coroner, whereby replication allowable the plea did not hold. And the case was such, Catling was taken and punished so much, as he confessed he had mortally offended, and that to be quitted of the pain; and Oskitell adjudged him to death upon his confession which he had made to the coroner, without trial of the truth of the pain, or the fact. And further, he caused the coroners and officers accessaries to be apprehended, who hanged the people, and all those who might have hindered the false judgment, and did not hinder the same in all cases; for he hanged all the judges who had falsely saved a man guilty of death, or had falsely hanged any man against law, or any reasonable exception.

33. He hanged the suitors of Calevot, because they had adjudged a man to death in a case not notorious, although he were guilty thereof; for no man can judge within the realm but the king, or his commissaries, except those lords in whose lordships the king's writ doth not run.

34. He hanged the suitors of Dorchester because they judged a man to death by jurors in their liberty, for a felony which he did out of the liberty, and whereof they had not the conusance by reason of for-eignty.

35. He hanged the suitors of Cirencester because they kept a man so long in prison, that he died in prison, who would have acquitted himself by foreigners, that he offended not feloniously.

36. In his time the suitors of Doncaster had their jurisdiction, besides other punishments, because they held pleas forbidden by the customs of the realm to judges, ordinaries and suitors to hold.

37. In his time Colgrin lost his franchise of enfangthief, because he would not send a thief to the common gaol of the county,

who was taken within his liberty for a felony done out of the liberty in guildable.

38. In his time Buttolphe lost his view of frank-pledges, because he charged the jurors with other articles than those which belonged to the view, and amerced people in personal actions where one was not to be amerced by a pecuniary punishment. And accordingly, he caused mortal rewards to criminal judges for wrongful mortal judgments, and so he did for wrongful judgments venials. Imprisonment for wrongful imprisonments, and like for like, with the other punishments; for he delivered Thelweld to prison because he judged men to prison for an offence not mortal.

39. He judged Lithing to prison because he imprisoned Herbote for the offence of his wife.

He judged Rutwood to prison because he imprisoned Olde for the king's debt.

On the other side he cut off the hand of Haulf because he saved Armock's hand, who was attainted before him that he had feloniously wounded Richbold.

He judged Edulfe to be wounded because he judged not Arnold to be wounded, who feloniously had wounded Aldens.

In lesser offences he did not meddle with the judgments, but disinherited the justices, and removed them according to the points of those statutes in all points where he could understand that they had passed their jurisdiction, or the bonds of their delegacy, or of their commission; or had concealed fines, or amercements, or other thing which belonged to the king; or had released or increased any punishment contrary to law, or procured the exercising or pleading without warrant, either by the property, by warrant of writ, or of a plaint of the possession, or e contra; or in the venial actions by words of felony, or e contra; or had sent to no party a transcript of his plea at the journey, or any of the parties wrongfully grieved, or done any other wrong in disallowance of a reasonable exception of the parties, or to the judgment.

In his time every plaintiff might have a commission and a writ to the sheriff, to the lord of the fee, or to certain justices assigned upon every wrong which was done.

In his time law was hastened from day to day, so that above fifteen days there was no default nor assoin adjournable.

In his time the parties might carry away the parts of their pleas under the seal of the judges, or the adverse parties.

In his time there was no stay of writs, all remedial writs were grantable, as of debts by virtue of an oath.

In his time the judges used to take twelve pence of every plaintiff at the journey.

In his time plaintiffs recovered not only damages of the issues of the possessions, and of the fees, but recovered costs as to the hurts, and as much as one might lawfully tax, by the occasion of such a fact.

A. H. ROBBINS.

MUNICIPAL CORPORATIONS—CARE OF PARK.

LONGWELL v. KANSAS CITY,

(Kansas City Court of Appeals. Missouri.
May 20, 1918.)

203 S. W. 657.

A city's use of a park for the purpose of providing Shetland ponies of reasonable gentleness, upon which children may ride properly attended, either for a consideration or gratis, is not foreign to the object for which public parks are maintained.

BLAND, J. This is an appeal from the action of the court in sustaining a demurrer to the petition in an action for personal injuries. The following negligence was alleged: That on or about the 29th day of March, 1896, defendant became the owner of a pleasure ground and park, called "Swope Park," by virtue of a deed of conveyance delivered to it by one Thomas H. Swope, which was

accepted by defendant; that one of the conditions of said deed was that the land "shall be used as a public pleasure ground or park forever"; that on the 29th day of August, 1916, defendant was maintaining said ground as a public park, and was maintaining restaurants, boating, pleasure grounds, zoological gardens, and Shetland ponies thereon; that defendant had established a rule or custom by virtue of which, and for a profit to it, all children visiting said park were invited to ride upon said ponies in said park for their enjoyment, recreation, or amusement, paying to it as a fee or charge therefor the sum of five cents; that on said day plaintiff was in said park for the purpose of obtaining the recreation and air provided by said defendant therein; that defendant's agent and servant, in accordance with said rule or custom, invited plaintiff to ride upon one of said ponies, and that plaintiff paid therefor the required fee of five cents; that thereupon said agent and servant seized the plaintiff and negligently placed him on the back of one of said ponies, whereupon said agent and servant negligently turned said pony loose, unattended, in the inclosure where it was kept, and it became unmanageable and ran, jumped, and cavorted, so that the plaintiff was thrown upon his back to the ground, resulting in plaintiff's injury; that plaintiff at the time was too immature and inexperienced to ride upon or guide said pony unattended with reasonable safety to himself; that plaintiff's legs were too short, and the back of said pony too broad and round, to enable plaintiff to maintain his seat thereon; that said pony had a vicious and unmanageable disposition; and that all of said facts, which caused the injury, were known to defendant's agent, or could have been known, etc.

It is the contention of the defendant that the act of the city in maintaining said ponies and in allowing plaintiff to ride thereon, under the facts and circumstances alleged, was ultra vires. To this plaintiff makes two answers: First, that the act was not ultra vires; and, second, that the city, in taking hire of said ponies, is estopped from setting up the claim of ultra vires. The second contention of plaintiff we need not pass upon. There is no contention in this case, at this time, but that the city, if it was acting within the powers granted to it in its charter to maintain a public park, is liable to plaintiff for the injuries sustained by him. The question presented to us is whether or not the maintenance of said ponies for the purposes described in the petition was within the power

of the city. It is said in *State ex rel. Wood, Attorney General, v. Schweickardt*, 109 Mo. loc. cit. 510, 19 S. W. 51, that:

"A park is variously defined to be 'a pleasure ground in or near a city set apart for the recreation of the public'; 'a piece of ground inclosed for purposes of pleasure, exercise, amusement, or ornament' * * *; 'a place open for every one.'"

There is no doubt but that, in order to provide means for recreation, air, exercise, and amusement, etc., in a park, a city may either secure the services of some one to provide these means or may provide them itself. And if the city in this case, in providing the Shetland ponies for recreation of children, was within the legitimate sphere of its authority, then the discretion vested in it in making such provision is free from outside interference, and not subject to judicial revision or reversal. *State ex. rel. v. Schweickardt*, supra, 109 Mo. loc. cit. 511, 19 S. W. 51.

We have made a diligent search in the books, but have found but two cases decided by the courts in this country involving the question as to what is within the legitimate exercise of the discretion vested in a city in affording pleasure, exercise, and amusement, etc., in public parks. One of these cases was decided by the Supreme Court of our state, cited *supra*, wherein it was held that the city was within its rights in leasing or renting space in a park for the purpose of furnishing refreshments to those visiting it; the other was decided by the Supreme Court of West Virginia, where it was held that a lease by a city of a park for a public park, to improve it and use it at times for training and running race horses, for a rental to the city, reserving access at times to the public for riding and driving on the track, was a legitimate use of the park, and not an ultra vires act. *Bryant v. Logan*, 56 W. Va. 141, 145, 49 S. E. 21, 23 (3 Ann. Cas. 1011). The court in the latter case states that, regardless of the broad powers in this connection granted the city by the legislature, nevertheless the act of the city complained of was not an unlawful diversion of the park; the court saying:

"Racing horses is enjoyed by thousands and thousands of people, high and low, rich and poor. The use of the park for this purpose would give people recreation and pleasure, and it is not foreign to the object for which it was purchased," it having been acquired "for the health, pleasure, and comfort of the people."

Parks are particularly inviting to children who live in cities: It is a matter of common knowledge that cities go to great

expense to condemn valuable property upon which there are improvements for the purpose of affording parks that are devoted exclusively to playgrounds for children. And while public parks usually are resorts for persons both old and young, it may be said that they are particularly designed for the amusement and recreation of children, and a place where they may go to play in the open air and light. It is hard to imagine a more appropriate way, if properly conducted, for the city to provide exercise and enjoyment for children than was afforded in this case. We think that the use of a park for the purpose of providing Shetland ponies of reasonable gentleness upon which children may ride, properly attended, either for a consideration or gratis, afford, beyond doubt, exercise, amusement, recreation, and pleasure for such children, and is not foreign to the object for which public parks are maintained, and that the city, having undertaken to do these things, is liable for negligence in the doing of them.

It is contended by the defendant that the maintenance of these ponies in the manner described in the petition is prohibited by defendant's charter. In support of this contention it refers us to section 39, art. 13, of the Kansas City Charter of 1909, which provides, among other things, as follows:

"And no shows or exhibitions of any character or kind shall be allowed or given in any park, square, or public ground of the city under the control of said board; but this shall not inhibit such musical entertainments, concerts, and zoological or other exhibits as may be provided by the board of park commissioners in any park, for the use and enjoyment of the public and for strictly park purposes."

Defendant contends that in this provision of the charter the only kind of "shows" or "exhibitions" that may be maintained in a public park in Kansas City are those provided by musical instruments, concerts, and zoological or other exhibits of the same general kind and character. We fail to see how this provision has any application to the matter of children riding on Shetland ponies in any park. The riding of a pony, either for hire or gratis, we think, is not a show or an exhibition. Webster defines a "show" as:

"That which is exhibited, held forth, or displayed; that which is arranged to be seen; a spectacle; an exhibition; as a traveling show; a cattle show."

And an "exhibition" as:

"That which is exhibited, held forth, or displayed; also, any public show; a display of works of art, or of feats of skill or of ora-

torical or dramatic ability; as, an exhibition of animals; an exhibition of pictures, statues, etc.; an industrial exhibition."

A show or exhibition is commonly understood to be something that one views, or at which one looks, and at the same time hears. We fail to see how the riding of ponies, such as described in the petition in this case, can be said to be a show or exhibition.

We do not feel that the city, in doing the things described in the petition, was acting ultra vires, and for this reason the judgment will be reversed, and the cause remanded; and it is so ordered. All concur.

NOTE.—*Incidental Revenue Derived from Park as Making City Liable for Negligence.*—Merely to maintain a park is governmental and negligence of servants of a city does not make a municipal corporation liable. But the instant case holds that, as it is within the power of a city to maintain a park, its negligence in this regard induces liability, whether it derives or does not derive any revenue therefrom.

In *Bisbing v. Asbury Park*, 80 N. J. L. 416, 78 Atl. 196, 33 L. R. A. (N. S.) 523, it is held that in the absence of a statute an action will not lie against a city for any special damage suffered by an individual in the performance of a public duty and the maintenance of a public park is governmental. That case also conceded, that even though revenue was derived from some part of a park, yet, if injury was suffered by reason of negligence applicable to another part there could be no recovery.

Thus where plaintiff was injured where a park was maintained in its integrity it was said: "Neither the grass plat nor the way upon which it bordered produced revenue to the city. They still remained to serve the public humanely and beneficently made possible by the law-givers, to promote the health and recreation of all citizens. In keeping up the public grounds, the agents of the city were fulfilling a corporate duty, imposed by law, from which the city derived no benefit in its corporate capacity. This was a governmental act and not the exercise of a power conferred for its own benefit." From other parts of the park buildings were rented, but plaintiff was not injured there.

In *Curran v. City of Boston*, 151 Mass. 505, 24 N. E. 781, 8 L. R. A. 243, 21 Am. St. Rep. 465, it was ruled that where a city maintained a workhouse established purely for public service and to assist in performance of its duty to support paupers, the fact that it derived some revenue from work of the inmates, was merely incidental and did not show the workhouse was conducted for pecuniary profit, and negligence of the city's servants whereby injury ensued, did not make the city liable.

The opinion quotes from a former case as follows: "There are many provisions of statutes by which municipal corporations must do certain things, and may do certain other things, in

each instance with a view solely to the general good." Speaking of the latter things it is said: "There is no good reason why a liability in a private action should be imposed where a town voluntarily enters upon such a beneficial work." *Tindley v. Salem*, 137 Mass. 171.

In the *Curran* case, speaking of the revenue derived, it was said: "We do not perceive any reason why the city should be held responsible because some revenue is derived from the labor of inmates. * * * It is not suggested that the expenses of maintaining the workhouse are met by what is derived from the labor of the inmates, or that any profit above them is made. * * * It only appears that as a public institution it is managed in a judicious and economical manner."

As the instant case went upon the theory that supplying Shetland ponies for children to ride made the city liable for any vicious acts of the ponies, though care may have been exercised in the selection, the question of their being hired for rides, was not an element in the determination of liability, at least not a conclusive test.

However, if the principles set forth in the cases cited and quoted from are true, the further question could be gone into as to the hire being or not being imposed for purposes of revenue. If this was simply a regulation preventing the ponies from being ridden to death, or to make selection by payment of a nominal fee give to a child paying the fee a privilege, by way of regulation, then, like the labor of inmates of a workhouse, this might be deemed a reasonable regulation. If the charge was merely incidental to regulation, it was not revenue in the true meaning of that term.

We do not discuss the position of the instant case declaring for liability as based on power. It is held in *Snider v. St. Paul*, 57 Minn. 466, 53 N. W. 763, 18 L. R. A. 151, that the rule of governmental action imposing no liability for negligence has its only real exception in the management of a city's streets. We believe this position to be just. C.

ITEMS OF PROFESSIONAL INTEREST.

REPORT OF THE MEETING OF THE GEORGIA BAR ASSOCIATION.

The Georgia Bar Association held its annual meeting June 7 and 8, at Tybee Island. The meeting was well attended, and the program was of much interest. As is usual with other Bar Associations, it was impossible to get this Association to consider any new matters of reform not already pending. A motion to discuss the subject of woman suffrage was tabled, and a request which came from influential sources, to have Miss Brannen,

daughter of Justice Brannen of the Court of Appeals of Georgia, make a talk to the convention on the subject, was refused.

The convention also refused to consider the subject of raising the standards for admission to the bar. The reason given by the committee for failing to make any recommendations was interesting. The report said:

"During the year there has been a marked decrease in the number of students attending the law schools in Georgia, as well as in other states, and a corresponding decrease in the number of applications for admission to the bar. This great decrease was brought about largely by the fact that the students of law have been in a considerable measure men within the age limits best fitting them for military service, and the committee expressed its pride in the fact that these students have not shirked, but have with almost absolute unanimity been ready and willing to offer themselves voluntarily for service in the army.

"In view of this great decrease in the number of law students, which decrease will probably be even greater next year, it is not, it seems to us, a very opportune time to consider any far-reaching recommendations for changes in methods of legal education or admission to the bar," the committee reported.

"That there are many defects in our system will doubtless be admitted by all. That the medical profession has made far more progress in upholding higher standards of education among its younger men than has our profession cannot be denied, and that we should endeavor to take steps to keep up a high standard of efficiency in the legal profession will doubtless also be generally admitted, though there will be great differences of opinion as to how this efficiency can best be obtained."

There can be no doubt that for the duration of the war bar associations will continue to mark time with respect to any matters of constructive reform. As in all other conventions, so in this one, the lawyers could find little to talk about except some phase of the great conflict now going on in Europe. Among the many resolutions passed was one pledging to President Wilson the confidence of the association and offering the support of every member in aid of his efforts to carry the unprecedented burden now resting upon him.

The following officers were elected: Samuel H. Sibley, of Union Point, president; I. J. Hofmayer, of Albany, secretary; Z. D. Harrison, of Atlanta, treasurer.

CORRESPONDENCE

SOLICITING OUT OF TOWN DAMAGE CLAIMS AGAINST RAILROADS.

Editor, Central Law Journal:—

I herewith hand you a suggestion for an order or a law, together with a copy of a letter which I have written to Secretary McAdoo.

While I believe that the employes should be fully paid for all claims accruing to them, and that others who transact business with the carriers should be fully paid all just claims, I believe that the employees, claimants and carriers, should no longer be harassed by a certain class of lawyers, and their agents, who are acting for the most part in their own interests—and not in the interests of the claimants and carriers.

I will be glad to know what you think of this suggestion.

Very respectfully,

PLATT HUBBELL

Trenton, Mo.

The enclosures with this letter include a communication to Director General McAdoo, advocating a general order or act of Congress providing as follows:

Whereas the Act of Congress approved March 21, 1918, entitled *An Act to Provide for the Operation of Transportation Systems While Under Federal Control*, provides (Section 10) "That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under state or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this Act or with any order of the President * * * But no process, mesne or final, shall be levied against any property under such Federal control;" and

Whereas, it further appears that some persons have made a practice of traveling away from their homes and soliciting claims and causing litigation against carriers by railroad, for the purpose of receiving a portion of whatever may be paid by a litigant to his attorneys, or, for the purpose of obtaining some financial remuneration to the person so soliciting such claims.

And, whereas, such practice is prejudicial to the interests of the government; and such practice prevents a fair and speedy settlement of differences between the carriers and their employees, and such practices consume valuable time of said carriers and their employees

in useless litigation and, thus seriously interferes with the physical operation of the railroads.

It is therefore, ordered, that, no person go from one country, ward, parish, or other similar political subdivision, for the purpose of soliciting a claim against any common carrier by railroad; and that no person write, telegraph, telephone, or otherwise communicate with another person in another county, ward, parish, or other similar political subdivision, for the purpose of soliciting a claim against any common carrier by railroad; and that, no person solicit a claim against a common carrier by railroad, anywhere, for the purpose of receiving any financial remuneration whatever, by the person so soliciting such claim; and, that no person act or advise with any claimant against a common carrier by railroad, excepting he be a regularly licensed attorney, practicing as such, or, a friend or relative acting and advising without any financial remuneration.

Whoever shall violate any of the provisions of this order shall be found guilty of a misdemeanor, and shall be fined not more than \$1,000, or imprisoned not more than one year, or shall be punished by both such fine and imprisonment.

BOOKS RECEIVED.

A History of Germanic Private Law. By Rudolph Huebner, Professor of Legal History in the University of Geissen. Translated by Francis S. Philbrick, Professor of Law in the University of California. With an editorial preface by Ernest G. Lorenzen, Professor of Law in Yale University, and introduction by Paul Vinogradoff, Corpus Professor of Jurisprudence in Oxford University, and by William E. Walz, Dean of the Faculty of Law in the University of Maine. Continental Legal History Series. Boston. Little, Brown & Company. 1918. Price, \$4.50. Review will follow.

Federal Statutes Annotated, Second Edition. Containing all the Laws of the United States of a General, Permanent and Public Nature in Force on the first day of January, 1916. Compiled under the editorial supervision of William M. McKinney. Edward Thompson Company, Northport, Long Island, N. Y., 1916. Price, \$7.50 per volume. Review will follow.

HUMOR OF THE LAW.

Rastus was in the toils again for chicken stealing, and this time the efforts of his law-years were unavailing.

"Have you anything to offer the court before sentence is passed?" asked the judge.

"No, sah, yer honor," said Rastus, "ah had five dollars, but mah lawyer dun tuk it!"—Puck.

Sweeney was a very new recruit; he was also a Knight of Columbus. His second day at camp was spent in hours of tiresome drill. Toward evening the top sergeant called out: "All K. P.'s step forward." Twelve men advanced and, when the others were dismissed, followed the officer toward the mess halls.

Sweeney was tired and hungry and favoritism was about to be shown to the dozen Knights of Pythias! He followed the men, muttering under his breath, and on reaching the hall heard the gruff "top" exclaim: "Now you kitchen police, get busy!"

The judge observed to the defendant: "You seem to have committed a grave assault on complainant just because he differed from you in an argument.

"There was no help for it, your honor," said the offender. "The man is a perfect idiot."

"Well, you must pay a fine of \$10 and the costs, and in future you should try to understand that idiots are human beings the same as you and me."

"The writer knows from experience on the circuit bench that it is sometimes very difficult for a judge to refrain from making comments on a case during the progress of a trial, and especially where an apparent injustice seems to have been perpetrated; but after a reversal or two, occasioned by this practice, he concluded to go, not to the ant, but to the meek and lowly oyster, to 'consider its ways and be wise,' and to keep the judicial mouth shut. He commends the example of the silent oyster to all trial judges." Per McBride, C. J. in *Edwards v. Mt. Hood Construction Company*, 64 Oregon 315.

To which the editor of Law Notes has pertinently added: "Preserving the salt water simile, with an oyster on the bench there is little chance for justice to escape the clutches of a shark at the bar."—Ohio Law Bulletin.

WEEKLY DIGEST

Weekly Digest of ALL the Important Opinions of ALL the State and Territorial Courts of Last Resort and of ALL the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

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1. **Adverse Possession—Wild Land.**—A claim of adverse possession to all the land within the lines of a marked boundary held not to put the claimant in adverse possession of wild, uncultivated, unimproved, and uninhabited land therein, not settled on or actually adversely held by the claimant.—*War Fork Land Co. v. Marcum*, Ky., 202 S. W. 668.

2. **Assignments—Pro Tanto.**—Assignment to bank, by contractor with city for street improvement, of all moneys which shall become payable to him under contract, expressly subject to claims for labor and materials, is not appropriation of fund, which does not take place until actual payment to bank, and then only pro tanto.—*National Surety Co. v. American Savings Bank & Trust Co.*, Wash., 172 Pac. 264.

3. **Associations—Unincorporated.**—In personal injury suit by employe against unincorporated association and two shareholders who were trustees and managing officers, court did not err in refusing to hold such members liable for such part only as would be arrived at by charging each with one-twelfth, etc., defendants being severally liable for full amount.—*Fisheries Co. v. McCoy*, Tex., 202 S. W. 343.

4. **Attorney and Client—Lien.**—Attorney's lien attached to cause of action from commencement of action, and, on entry of judg-

ment, to judgment itself.—*Smith v. First Nat. Bank*, N. Y., 170 N. Y. S. 127.

5. **Bankruptcy—Appeal and Error.**—A proceeding on petition by trustee to sell lands, on theory that warranty deed evidenced equitable mortgage, opposed by grantee, is controversy arising in bankruptcy proceeding, instead of proceeding in bankruptcy, and hence appeal to review judgment therein lies under general appellate jurisdiction of Circuit Court of Appeals; case not being one in which Bankruptcy Act specifically provides for an appeal.—*Sauve v. M. L. More Inv. Co.*, U. S. C. C. A., 248 Fed. 642.

6. **Discharge.**—Discharge already granted will not be vacated at the instance of a creditor whose claim was not barred by the discharge.—*In re Grodzinsky*, U. S. D. C., 248 Fed. 753.

7. **Discharge.**—Despite Bankruptcy Act July 1, 1898, § 14b (3), as amended by Act June 25, 1910, § 6, as section 17 declares that a discharge shall not release bankrupt from liability based on false pretenses or representations, the claim of one who extended credit on a materially false statement is not barred, though such creditor participated in the bankruptcy proceedings and unsuccessfully opposed discharge.—*In re Grodzinsky*, U. S. D. C., 248 Fed. 753.

8. **False Swearing.**—One guilty of false swearing in a bankruptcy proceeding is punishable under Bankruptcy Act, § 29b (2), denouncing offense of false swearing in bankruptcy proceedings, instead of under Penal Code, § 125, which is the general statute applicable to prosecutions for perjury.—*Rosenthal v. United States*, U. S. C. C. A., 248 Fed. 684.

9. **Preference.**—A mortgage given by bankrupt more than four months before filing of petition, which under state law was valid against creditors other than those having a lien, is not, though recorded within four-month period, subject to attack by trustee, who under Bankruptcy Act July 1, 1898, § 47a, as amended by Act June 25, 1910, § 8, takes status of a lien creditor as of time petition was filed; mortgage having been recorded before rights of any lien creditors attached.—*Bonner v. First Nat. Bank*, U. S. C. C. A., 248 Fed. 692.

10. **Tax Sale.**—Where title, subject only to a possible defeasance, was vested by deed in purchaser at tax sale, trustee of bankrupt owner, not qualifying until legal title was absolute in purchaser, took no rights not possessed by bankrupt.—*Beckham v. Lindsey*, Ga., 95 S. E. 745.

11. **Banks and Banking—Estoppel.**—Where cashier of defendant bank represented to plaintiff, who had previously rediscounted paper for defendant, that note was part of assets of defendant, and plaintiff discounted note, defendant, having received proceeds, cannot escape liability on ground that note did not in fact belong to it.—*Meyer & Chapman State Bank v. First Nat. Bank*, U. S. C. C. A., 248 Fed. 679.

12. **Interest.**—In assumpsit for interest on bank deposits, statement of claim alleging that interest was payable semi-annually meant simply that twice in each year interest was to be calculated upon and added to account, and not

its accrual at those times as separate demand.—*Osterling v. Allegheny Trust Co., Pa.*, 103 Atl. 528.

13.—**Notice.**—That the agent of a bank discounting a note knew that the payee of the note did not have sufficient money in bank to erect a building held insufficient to charge the bank with knowledge that collateral notes taken by the bank were obtained by such payee on fraudulent representations that it had sufficient funds for such purpose.—*Ellis v. First Nat. Bank, Ariz.*, 172 Pac. 281.

14.—**Receivership.**—Where certificate of deposit was left with bank for collection and bank went into hands of receiver, depositor was entitled to follow certificate into hands of another bank which discounted certificate, or could proceed against first bank and have preference to proceeds which could be identified, although, unknown to him, the bank had credited the amount to his account.—*State v. Farmers' State Bank of Bridger, Mont.*, 172 Pac. 130.

15.—**Bills and Notes.**—Consideration.—A note given to a bank by one of its stockholders in payment of an allotment of stock in a real estate company formed by mutual agreement among all the stockholders of the bank was not void as being without consideration.—*First Nat. Bank v. Henry, Mo.*, 202 S. W. 281.

16.—**Serial Notes.**—In action on one of a series of notes, where plea interposed to rent consideration was insufficient, and value of cotton agreed to be paid by way of rental, if any note was not paid at maturity, was admitted, direction of verdict for plaintiff was not error.—*McDaniel v. Bank of Bethlehem, Ga.*, 95 S. E. 724.

17.—**Brokers.**—Agency.—Where it appears that officers of a corporation were acting for the corporation in employing an agent to sell land and it was conveyed by the corporation, the corporation is liable for the agent's commission although authority of officers was not shown.—*Rowland v. Progressive Inv. Co., Mo.*, 202 S. W. 257.

18.—**Carriers of Goods.**—Notice to Shipper.—One who delivers property to a carrier consigned to himself at a place where he does not reside and has no representatives or place of business is bound to put himself in a position to receive notice, and, failing to do so, cannot be heard to complain that notice was not given.—*Rosenbaum v. Northern Pacific Ry. Co., Wash.*, 172 Pac. 238.

19.—**Prima Facie Case.**—Plaintiff establishing a prima facie case by evidence that at destination corn near doors of car was wet, defendant railroad company failed to rebut same by evidence that it tested the car door by turning water from a hose on it; there being no evidence that the car did not leak while running against a blowing rain.—*Rhodes v. Gulf C. & S. F. Ry. Co., Tex.*, 202 S. W. 815.

20.—**Carriers of Live Stock.**—Notice of Loss.—Filing suit and service of citation in less than 91 days complied with requirement of notice within such time in live stock shipping contract.—*Galveston, H. & S. A. Ry. Co. v. Gibbons, Tex.*, 202 S. W. 352.

21.—**Carriers of Passengers.**—Negligence.—Presence of cuspidor in the smoking compartment of a car is not negligence; and negligence of employees, whereby it was in the passageway, concealed by the curtain, so that a passenger stumbled over it, must be shown.—*Hawkins v. Louisville & N. R. Co., Ky.*, 202 S. W. 632.

22.—**Charities.**—Removal of Trustee.—Where testator devised land, including his farm, in

trust for maintenance of industrial school and land subsided by reason of mining of coal beneath it, an order permitting trustee's removal of institution to another county was proper.—*In re Toner's Estate, Pa.*, 103 Atl. 541.

23.—**Chattel Mortgages.**—Trespass.—Where there was valid mortgage conveying title and right to possession to mortgagee, mortgagor had given possession to the mortgagee, and law day had passed which gave mortgagee the right to sell, mortgagor could not maintain trespass, trover, or detinue against the mortgagee.—*Lineville Nat. Bank v. Weaver, Ala.*, 78 So. 461.

24.—**Commerce.**—Interstate Shipment.—Transportation of liquors through this state from one state to another by automobile over public highways, instead of by rail or boat, is "interstate shipment" if there be no break or disconnection therein.—*Moragne v. State, Ala.*, 78 So. 450.

25.—**Interstate Telegram.**—Though sending and delivery points of message were within the state, if route of transmission was through another state, the message was interstate, although had wires not been down the message could have been sent altogether within the state.—*Davis v. Western Union Telegraph Co., Mo.*, 202 S. W. 292.

26.—**Joint Rates.**—Under Interstate Commerce Act, §§ 3, 15, Interstate Commerce Commission held to have power by an order to stop practices found to be unduly preferential or prejudicial, even though arising on a division of joint through rates.—*Chestnut Ridge Ry. Co. v. United States, U. S. D. C.*, 248 Fed. 791.

27.—**Negligence.**—In action under federal Employers' Liability Act, the terms "negligence" and "contributory negligence" are to be interpreted in the light of the common law as construed by the federal courts, free from legislative interference.—*McLain v. Chicago Great Western R. Co., Minn.*, 167 N. W. 349.

28.—**Constitutional Law.**—Conflict of Laws.—The usual rule is that, where a contract made in a foreign country involves no moral turpitude and is valid where made, it will be held valid in the courts of the United States, although it would not be valid if made there.—*The Talus, U. S. C. C. A.*, 248 Fed. 670.

29.—**Due Process of Law.**—Could decree against executor for devastavit committed by him as such be deemed to give complainant right to appropriate property of sureties under execution against executor, exercise of such right would be in violation of due process of law clause of Const. U. S. Amend. 14.—*Gillispie v. Riggs, U. S. D. C.*, 248 Fed. 843.

30.—**Due Process of Law.**—A father has no property right in a child, and a claim that he was deprived of his property without due process of law and without compensation in violation of Const. U. S. Amend. 14, in that by losing its custody in divorce proceedings where he was not personally served with process he was deprived of its services cannot be considered.—*Kenner v. Kenner, Tenn.*, 202 S. W. 823.

31.—**Contracts.**—Architect.—An architect owes to his employer the duty of exercising and applying skill, judgment, and taste reasonably and without neglect in the preparation of plans and specifications for proposed structure.—*Bayshore Development Co. v. Bonfoey, Fla.*, 78 So. 507.

32.—**Corporation.**—Ouster.—The entry of judgment of ouster against a corporation for failure to pay into its treasury the 10 per cent. in cash required by statute does not affect its rights as a corporation de facto prior to such judgment, and as to third parties its transactions are valid.—*Northrop v. P. W. Finn Const. Co.*, 248 Fed. 756.

33.—**Ratification.**—The ratification or adoption by a corporation of an agreement of its officers could not shield them from responsibility for the consequences of their own fraud in connection therewith.—*Wright v. Barnard, U. S. D. C.*, 248 Fed. 726.

34.—**Seal.**—Where purported deed of corporation contained recital, "Witness its hand and seal," and was signed with corporate name,

followed by name of one signing as secretary and treasurer, and word "[Seal]" followed name of corporation, there was prima facie evidence of authority to execute it.—Boone v. Jenkins, Ga., 95 S. E. 707.

35.—**Subscription to Stock.**—Ordinarily cause of action for installments of stock subscription payable on call of directors does not accrue until time fixed by directors for payment.—Thomas v. Kalbfus, Ohio, 119 N. E. 412.

36. **Damages.**—Presumptions.—Presumption of damage or loss of gain is indulged as against wrongdoers, but they must be reasonable and have relation to loss or damage, which there is a reasonable probability would not have occurred, had not the wrong been committed, and they do not exist with respect to purely speculative or remotely possible loss.—Wright v. Barnard, U. S. D. C., 248 Fed. 756.

37.—**Remoteness.**—In owner's action for damages from negligence and unskillfulness of architect in preparing plans and specifications for building, loss of rentals due to delay in occupying premises are too remote and speculative to be considered as damages.—Bayshore Development Co. v. Bonfoey, Fla., 78 So. 507.

38. **Descent and Distribution.**—Widow.—Where a widow for a purpose other than to support herself and minor children sold property set apart from the decedent's estate for a year's support, one purchasing from the first buyer without notice of the purpose for which the property was sold took title good as against the widow and children.—Gibson v. Hodges, Ga., 95 S. E. 696.

39. **Drainage.**—Injunction.—Where landowner colluded with attorney to file repeated harassing petitions for establishment of drainage district, in order to collect counsel fees, and to wear down opposition by repeated filing, adverse landowners were entitled to injunction restraining such acts.—Haines v. Trueblood, Ind., 119 N. E. 383.

40. **Equity.**—Fraternal Society.—Where member of fraternal benefit society observed requirements of by-laws in making change of beneficiary, but, through delay for which he was not responsible, the change was not perfected until after his death, the new beneficiary is entitled to recover under the equity maxim that equity will regard as done that which ought to have been done.—United Artisans v. Cronise, Ore., 172 Pac. 109.

41. **Estoppel.**—False Representatives.—Officers of corporation held estopped by false representations in contracting with plaintiff to deny ownership and control of the corporate stock and their power to amend the charter and do the other things required to be done by the company.—Wright v. Barnard, U. S. D. C., 248 Fed. 756.

42. **Executors and Administrators.**—Injunction.—Though complainant recovered decree in state court against executor of his father's estate for devastavit committed by executor, that decree does not establish liability of sureties on executor's bond, so as to warrant complainant in maintaining suit in federal court to enjoin such sureties from disposing of their property until decree should be satisfied.—Gillisple v. Riggs, U. S. D. C., 248 Fed. 843.

43. **False Imprisonment.**—Evidence.—Where agreement is made as to price to be paid for dental work, such agreement controls, and reasonable value of dentist's services, if otherwise competent, is immaterial in action by patient for false imprisonment by him to make her pay what he claimed she owed.—Salisbury v. Poulson, Utah, 172 Pac. 315.

44. **Fixtures.**—Personal Property.—Where park company leased land for erection of scenic railway by tenants, and lease provided option in company to purchase railway, it was personal property, subject to removal after expiration of term if not purchased.—Calder's Park Co. v. Corless, Utah, 172 Pac. 310.

45. **Fraud.**—Executory Contract.—If, while a contract is executory, one party discovers that he has been defrauded or learns facts that put

him on inquiry, and then executes the contract, he cannot thereafter sue for damages.—Encyclopedia Press v. Harris, Minn., 167 N. W. 363.

46.—**Transfer of Stock.**—Transfer of stock by father to daughter in good faith and in payment of or security for his indebtedness to her is valid, though he is financially involved.—Tepburn v. United Water, Gas & Electric Co., N. J., 103 Atl. 522.

47. **Frauds, Statute of.**—Oral Modification.—Where mining lease on certain royalties was written, but was orally modified on discovery of conditions making work more difficult, and one party sunk shafts, took out ore, and paid royalties, there was such part performance as to remove the contract from the statute of frauds.—Last Chance Mining Co. v. Tuckahoe Mining Co., Mo., 202 S. W. 287.

48. **Fraudulent Conveyance.**—Husband and Wife.—Whatever presumption or inference, either of law or fact, may be drawn from circumstance that grantee is the wife of grantor, is overcome by evidence indicating that through her natural wifely confidence in her husband great portion of her inheritance has been wasted.—Vogt v. Marshall-Wells Hardware Co., Ore., 172 Pac. 123.

49.—**Voluntary Transfer.**—Where insolvent debtor makes voluntary transfer of property, not exempt from debts, to those who are near of kin, whether he intends fraud or not, transfer operates as fraud on creditors, hindering, delaying, or defeating them in collection of claims.—Davis v. Cramer, Ark., 202 S. W. 239.

50. **Highways.**—Evidence.—In action for death of boy, run down by automobile near culvert, testimony that defendant, up to within 90 feet of culvert, was running at 25 miles an hour, held admissible, in view of defendant's testimony and physical facts, as corroborative of fact that defendant failed to slow down at culvert.—La Duke v. Dexter, Mo., 202 S. W. 254.

51.—**Opening of.**—Where court found that town supervisors laid out a road along a section line, and further finding that it was never opened, but that another road was opened, was not sustained by the evidence, the opening would be considered pursuant to order of the supervisors.—Hrdlicka v. Haberman, Minn., 167 N. W. 363.

52.—**Trespass.**—Act of municipal corporation while engaged in improving public highway in diverting surface waters and by artificial means casting them upon private property is "trespass" for which it is liable without regard to question of negligence.—Kiefer v. Ramsey County, Minn., 167 N. W. 362.

53. **Husband and Wife.**—Automobile.—Husband's mere permission that his wife may use his automobile for pleasure of herself and relatives, without his direction or request that she so use it, does not make her his agent so as to render him liable for her negligence resulting in injury to a third person.—Mast v. Hirsh, Mo., 202 S. W. 275.

54. **Indemnity.**—Surety.—Where brewing company obtained property in replevin, and defendants obtained judgment for the property against sheriff and against surety on replevin bond, which was paid, and surety filed claim with receiver for brewing company, which was allowed, and the surety on the receiver's bond paid the claim and sued the sheriff's bondsman, notice to brewing company and receiver's bondsmen of the action, with demand that they defend did not obligate them unless they were liable over by express contract or operation of law.—McRae v. Angeles Brewing Co., Wash., 172 Pac. 263.

55. **Insane Persons.**—Inquisition.—Finding of jury in lunacy inquisition that testator was non compos mentis on a certain date, and without lucid intervals during a period preceding such date within which will was made, is only prima facie evidence, and may be overcome by satisfactory evidence of capacity.—In re Coleman's Will, N. J., 103 Atl. 521.

56. **Insurance.**—Accident.—Where accident insurance policy excepted injuries resulting wholly or partly, or directly or indirectly from, or while, or in consequence of being affected by

intoxicants, etc., defense thereunder is affirmative, and the burden is on insurer to establish it.—*Bowers v. Great Eastern Casualty Co., Pa., 103 Atl. 536.*

57.—Assignment of Policy.—Mere fact that general creditor of deceased served notice on insurer that assignment of policy to claimant was fraudulently made to avoid payment of the debt did not constitute any lien, claim, or right against the moneys payable under the policy nor against the insurer.—*O'Neill v. Mutual Life Ins. Co. of New York, Utah, 172 Pac. 306.*

58.—Beneficiary.—Where a member of fraternal organization died after having forwarded, according to the by-laws, a request to change the beneficiary, but before such change had actually been made by the grand secretary, held, that the new beneficiary was entitled to recover.—*United Artisans v. Cronise, Ore., 172 Pac. 109.*

59.—Pleading and Practice.—Complaint in an action on life policy by assignee who has paid premiums alleging assignment and making policy part of complaint does not state cause of action, where such policy forbids assignment thereof in absence of facts showing waiver or estoppel on the part of insurance company.—*Prudential Ins. Co. of America v. Ritchey, Ind., 119 N. E. 369.*

60.—Sending Policy by Mail.—Where insurer sent policy to agent and returned insured's premium note, stating that delivery of policy to insured would be at agent's risk, it relied on ultimate liability of agent, and could not defeat action on policy because insured did not pay note.—*Taylor v. Farmers' & Bankers' Life Ins. Co., Kas., 172 Pac. 35.*

61.—Suicide.—Rev. St. 1909, § 6945, abolishing defense of suicide in all cases except where insured contemplated suicide when he applied for policy, is applicable to insurance companies on assessment plan.—*Gates v. Knights Templars & Masonic Mut. Aid Ass'n, Mo., 202 S. W. 280.*

62.—Landlord and Tenant.—Repairs.—Landlord who voluntarily engaged to make repairs was bound to exercise ordinary care properly to make such repairs for that time, but was not bound to continue making repairs.—*Vollrath v. Stevens, Mo., 202 S. W. 283.*

63.—Libel and Slander.—Defamatory Statement.—A teacher's entry in a school register, kept under Rev. Laws 1910, § 7828, that a certain pupil was ruined by tobacco and whisky, is defamatory.—*Dawkins v. Billingsley, Okla., 172 Pac. 69.*

64.—Master and Servant.—Chauffeur.—Owner of automobile who ordered chauffeur to bring car around to front for her was not liable for injuries to third persons in collision caused by chauffeur's negligence while returning from store with car where he had gone to get cigarettes for himself.—*Healey v. Cockrill, Ark., 202 S. W. 229.*

65.—Proximate Cause.—Where it can be shown that brakeman's death was caused by parting of train due to defective coupler, the railroad is liable for his death though breaking of coupler was caused by bursting of air hose; the defective coupler, although a contributing cause, being an efficient, and hence proximate cause of injury.—*Hubbard v. Tacoma Eastern R. Co., Wash., 172 Pac. 222.*

66.—Selection of Physician.—Employer employing physician of ordinary skill to attend to employees who is paid from fund collected from employees from which employer derives no profit is not liable to employee for mistake or malpractice, if not negligent in selecting physician.—*Congdon v. Louisiana Sawmill Co., La., 78 So. 470.*

67.—Workmen's Compensation Act.—Under Gen. St. 1915, § 5904, minor's action, by next friend, to recover under Workmen's Compensation Act, is not barred because written claim for compensation was not served within three months from date of injury, where no guardian was appointed.—*Minturn v. Proctor & Gamble Fig. Co., Kan., 172 Pac. 17.*

68.—Mechanics' Liens.—Completion of Contract.—Under liberal construction of Lien Law, required by section 23 thereof, it cannot be held that, to entitle materialmen and subcontractors to liens, the contractor must have fully completed the principal contract, with a balance then due it.—*American Radiator Co. v. City of New York, N. Y., 119 N. E. 391, 223 N. Y. 193.*

69.—Priority.—Where pending a mechanic's lien foreclosure one of the defendants foreclosed a deed of trust on the property, neither he nor the holder of a subsequent deed of trust nor the trustee thereunder, both deeds having priority over the lien, had any further interest in the controversy, and the case should have been dismissed as to them.—*Hunter v. Masner, Mo., 202 S. W. 261.*

70.—Mines and Minerals.—Rentals.—Under warranty deed of coal underlying land without limitation as to time for removal or as to passageways, the grantee took an estate in fee in coal, and was entitled to possession of space made by its removal which he might use in transporting coal from other lands, and cannot be charged with rental in so doing.—*Westerman v. Pennsylvania Salt Mfg. Co., Pa., 103 Atl. 539.*

71.—Municipal Corporations.—Mechanics' Lien.—Although contract for erecting municipal school building provided that contractor should not be entitled to payment until work was fully completed, further provision for payment of installments on certificate that "payment is due" made valid liens of materialmen and subcontractors filed before completion of the work, when contractor held certificate for an amount due.—*American Radiator Co. v. City of New York, N. Y., 119 N. E. 391, 223 N. Y. 193.*

72.—Ordinance.—Junk ordinance of city of Atlanta, requiring license, payment of occupation tax, and bond to pay damages on account of dishonest or fraudulent conduct of business, etc., does not deprive dealers of equal protection of laws.—*Shurman v. City of Atlanta, Ga., 9 S. E. 698.*

73.—Surety.—Surety on bond given pursuant to Laws 1915, p. 227 (Rem. Code 1915, § 562—37 et seq.), as to operating automobiles for hire in cities, held liable to negligence of driver, where principal failed to remove license number on sale of car, as required by Laws 1915, p. 391, § 13 (Rem. Code 1915, § 5562—13).—*Peters v. Casualty Co. of America, Wash., 172 Pac. 220.*

74.—Negligence.—Attractive Nuisance.—That lock bar on turntable was left in place by railroad employee using turntable does not affect liability of company for injury to child playing on turntable; such lock bar not being a secure fastening, but used simply to hold the turntable track in line when switching, and being easily shaken loose by trespassing children.—*Gulf, C. & S. F. Ry. Co. v. Chappell, Tex., 202 S. W. 366.*

75.—Imputability.—Where a boy riding on a truck did not purposely or wantonly go into danger, and did not drive the truck or have any control over its movements, any negligence of driver could not be imputed to him.—*Newton v. Harvey, Mo., 202 S. W. 249.*

76.—Intoxication.—In action for injuries to pedestrian struck by automobile, evidence that he was intoxicated was admissible in cross-examination after he had estimated speed of the automobile, since intoxication reflects on capacity for accurate observation, and renders such cross-examination admissible under Rev. Codes, § 8021, which must be liberally construed.—*Herzig v. Sandberg, Mont., 172 Pac. 132.*

77.—Proximate Cause.—Where owner negligently left his automobile unattended on street car tracks and a street car was negligently run into it, catapulting it against one working at the curb, the owner of the automobile was liable for the injuries.—*Keiper v. Pacific Gas & Electric Co., Cal., 172 Pac. 180.*

78.—Parent and Child.—Liability of Parent.—If member of family takes automobile out on own business or pleasure, the father, though consenting thereto, is not liable for driver's

negligence, but, if driver is performing a duty which father owes, he is liable. —*Mast v. Hirsh*, Mo. A., 202 S. W. 275.

79. **Partnership**—Pleading and Practice.—In action on partnership note, stating common cause of action against all of its members, fact that one of them died and his executrix was substituted for him as defendant, since it did not make the cause of action a claim against estate of the deceased partner, did not make essential to complaint averments showing there were no partnership assets out of which plaintiff could make its claim and no solvent partner living.—*Reed v. Farmers' Bank of Frankfort, Ind.*, 119 N. E. 261.

80. **Railroads**—Evidence.—In an action against a railroad company for damages for destruction of machine shops, it is not competent to show other engines of defendant at other times set fire to same or other property similarly situated, without first showing equipment, management, and conditions were similar.—*Douglass v. Central of Georgia Ry. Co., Ala.*, 78 So. 457.

81.—**Instructions**—Where plaintiff showed that a fence could have been built within six feet from rails without encroaching upon parallel road, defendant railroad, which did not undertake to show that fence so built would be dangerous to employees, could not complain that jury was not instructed as to whether such fence would be dangerous to employees.—*Dabbs v. Kansas City Southern Ry. Co., Mo.*, 202 S. W. 276.

82. **Release**—Consideration.—A release signed by an injured employee of an electric railway company in consideration of medical services is based on a good consideration; the contract of employment not obligating the company to pay therefor.—*Hogard v. Kansas City Rys. Co., Mo.*, 202 S. W. 431.

83. **Sales**—Delivery on Installments.—Under a contract to deliver coke to meet defendant's requirements for a year estimated at 40,000 tons, to be shipped in approximately equal monthly installments, each delivery to be treated as a separate contract, defendant was not entitled to demand delivery in excess of 3,333 1/3 tons a month.—*Poland Coal Co. v. Rogers, Pa.*, 103 Atl. 559.

84.—**Forfeiture**—Ordinarily, all payments made on account of purchase price of goods would be forfeited by buyers failure to perform.—*Raymond v. General Motorcycle Co., Mass.*, 119 N. E. 359.

85. **Specific Performance**—Condition Subsequent.—The vendee under a deed conditioned to be void if he failed to make payments as required could not, after his default and abandonment of contract, maintain suit for specific performance of the contract to convey good title; the land having doubled in value at time suit was brought.—*Swain v. Beakley, Ark.*, 202 S. W. 476.

86. **Taxation**—Domicile.—A corporation domiciled in Illinois, owning and leasing tank cars, cannot be assessed for all the cars owned by it, but only for the average number in the state during the taxing period.—*Keith Ry. Equipment Co. v. Board of Review of Cook County, Ill.*, 119 N. E. 302.

87. **Threats**—Extortion.—Threatening to accuse and prosecute a thief unless he pays value of property stolen, and which he pays by reason of fear induced thereby, is, without reference to good faith in exacting the amount justly due, extortion, within Pen. Code, § 418.—*People v. Beggs, Cal.*, 172 Pac. 152.

88. **Trover and Conversion**—Evidence.—In suit for conversion of scrap iron purchased by plaintiff, plaintiff's testimony that between time of purchase and time of defendant seller's alleged conversion price of scrap iron had advanced was admissible to show reason for conversion.—*Waldrop v. Goltzman, Tex.*, 202 S. W. 335.

89.—**Witness**—In suit to recover part of proceeds of bank stock sold, plaintiff claiming she owned five shares, court improperly refused

to permit defendant's mother to testify plaintiff did not claim to have furnished any of money which went into stock.—*Pledge v. Griffith, Mo.*, 202 S. W. 460.

90. **Trusts**—Attorney.—Services of an attorney to a trust estate in resisting an effort to remove one of two trustees, and in procuring the appointment of a third trustee, thereby breaking a deadlock, were beneficial to the estate.—*Jessup v. Smith, N. Y.*, 119 N. E. 403, 223 N. Y. 203.

91.—**Escrow**—Where stock was to be increased, and one-third placed in escrow for plaintiff, held that trust could not be impressed on one-third of company's stock, where plaintiff was deprived of opportunity to comply with conditions; the company having no treasury stock, and ability of plaintiff to perform being conjectural.—*Wright v. Barnard, U. S. D. C.*, 248 Fed. 756.

92.—**Fraud**—Court cannot construct trust where misconduct amounts merely to breach by grantee of absolute deed of his oral agreement to reconvey, and there was no fraud or undue influence connected with transaction in its inception.—*Moore v. McClain, Ind.*, 119 N. E. 258.

93.—**Remitting Trust**—Where testator gave all his interest in commission business to his brother and a son, and son deeded his interest to brother, brother, who declared by trust deed that property bequeathed was held in trust for testator's children, could discharge his whole duty by calling in or realizing on capital including good will of the business and paying it over.—*Kremelberg v. Thompson, N. J.*, 103 Atl. 523.

94. **Vendor and Purchaser**—Time of Essence.—Rule that vendor may discharge an incumbrance, presently payable, out of purchase price simultaneously with its payment and delivery of deed, does not apply where time is of essence of contract, unless vendor can discharge incumbrance at time fixed for performance.—*Johnson v. Herbst, Minn.*, 167 N. W. 356.

95. **Wills**—Child Capable of Living.—A child born capable of living, being by Civ. Code, art. 186, and according to laws of nature, presumed to have been conceived at least 180 days before its birth, is born in time to receive, by testamentary disposition, an estate of a person dying within 180 days before its birth.—*Tyler v. Lewis, La.*, 78 So. 477.

96.—**Execution**—Where will signed by mark had attestation clause showing proper execution, and attesting witnesses testified to all facts of execution themselves, will was properly admitted to probate, though witnesses could not testify testator personally made mark.—*Flynn v. Flynn, Ill.*, 119 N. E. 394.

97.—**Insane Delusion**—That testator, man of 70, and of sound mind and body, was under mistaken impression that value of his investments was greater than it was, was not sufficient evidence that he was laboring under insane delusion, where will itself furnished no evidence of any such delusion.—*In re Friday's Estate*, 103 Atl. 553.

98.—**Pecuniary Interest**—A "person interested," within Gen. Code, § 12079, is one who at commencement of will contest has a direct pecuniary interest in estate of putative testator, that would be impaired or defeated if instrument admitted to probate is a valid will.—*Chilcote v. Hoffman, Ohio*, 119 N. E. 364.

99.—**Residuary Legatee**—Action against residuary legatee of subscriber to stock brought within one year after order of court could not be defeated on ground that claim was not presented to and suit brought against executors of subscriber's estate, nor that suit was not brought against legatee within one year after receiver's appointment.—*Thomas v. Kalbfus, Ohio*, 119 N. E. 412.

100.—**Corporations**—In suit on contract to purchase stock in insurance company when domicile of company was removed to another county, a nonsuit was proper, where the evidence did not show charter amendment authorizing a legal removal.—*Lexington Presbyterian Church v. Reid, Ga.*, 95 S. E. 723.